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IN THE

Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Ninth Circuit Court of Appeals found two isolated provisions of the Child Pornography Prevention Act of 1996 to be unconstitutional on the basis that those provisions impose an unjustifiable restriction on free speech and are unduly vague and unnecessarily overbroad. The first provision bans sexually-explicit visual depictions that "appear to be" minors. The second provision prohibits sexually-explicit material that is advertised in a way that "conveys the impression" that minors are depicted. The fundamental question posed by this case is whether sexually-explicit, non-obscene material that does not depict any actual children can be labeled and banned by Congress as "child pornography."

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SUMMARY OF THE ARGUMENT

A writ of certiorari is not warranted in this case because the three primary arguments raised by Petitioners in support of their petition are without merit.

First, the court of appeals was correct in concluding that two isolated provisions within the Child Pornography Prevention Act of 1996 ("CPPA") impose an unconstitutional prohibition on free speech, are unduly vague and unnecessarily overbroad. By banning sexually-explicit materials that depict persons who "appear to be" minors or that are advertised to "convey the impression" that minors are depicted, the CPPA is a content-specific prohibition on speech that is not justified by a narrowly-tailored compelling governmental interest. This Court has made it clear that the Government's interest in regulating child pornography is limited to sexually-explicit materials in which actual children are depicted. The CPPA's "appears to be" and "conveys the impression" provisions exceed this limited interest by banning materials that do not depict any real children. In so doing, these provisions violate the First and Fifth Amendments.

Second, even with the two unconstitutional provisions stricken from the legislation, the CPPA remains a comprehensive and effective tool for fighting the real evils of child pornography. The court of appeals excised only two isolated portions of the CPPA, leaving the bulk of the legislation intact. Contrary to Petitioners' contentions, the constitutionally-corrected CPPA is more than adequate to satisfy Congress' objectives in confronting the evils of child pornography.

Third, there is no real conflict among the circuits on this issue. Unlike the material in this case, which involves no real children, the other CPPA cases from the First, Fourth, and Eleventh Circuits concerned criminal prosecutions involving sexually-explicit material containing actual children. The defendants in those cases would have been charged with child pornography offenses under the CPPA even without the unconstitutional "appears to be" and "conveys the impression" provisions. Thus, those portions of the circuit courts' decisions regarding the constitutionality of those provisions are mere dicta.

For these reasons, the court of appeals' decision in this case does not warrant review by this Court.

STATEMENT OF THE CASE

This case addresses whether the CPPA violates the First and Fifth Amendments to the United States Constitution. While the material facts underlying this case are not in dispute, there are some facts that Respondents believe are omitted or mischaracterized by Petitioners ("the Government") in their petition for certiorari. It is therefore necessary to provide a limited recitation of the background and facts of this case.

A. The Child Pornography Prevention Act Of 1996

This case confronts the constitutionality of Congress' attempt to define and punish as illegal child pornography constitutionally-protected forms of expression involving no actual children. On September 30, 1996, Congress enacted Public Law 104-208, the Child Pornography Prevention Act of 1996, which, for the first time in legislative history,

radically transformed the definition of "child pornography" by including in that definition sexually-explicit depictions that contain no actual children.[1] Prior to the CPPA, Congress classified child pornography as sexually-explicit material in which actual children are depicted.[2] Specifically, the CPPA defines child pornography as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where —
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, **or appears to be**, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an

1. The CPPA amended Title 18, Chapter 110 of the United States Code by revising sections 2251, 2252, 2256 and adding a new Section 2252A. Section 2252A, entitled "Certain activities relating to material constituting or containing child pornography," prohibits persons from, *inter alia*, mailing, transporting, receiving, distributing, reproducing, selling or possessing *child pornography*, as redefined by the CPPA, within interstate or foreign commerce. 18 U.S.C. § 2252A (Supp. IV 1998)

2. "Child" and "minor" are used synonymously in this brief. A minor is defined as "any person under the age of eighteen years." 18 U.S.C. § 2256(1) (Supp. IV 1998).

> identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that **conveys the impression** that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . .

18 U.S.C. § 2256(8) (emphasis added).

Thus, in addition to banning visual depictions of real children who are actually involved in sexually-explicit conduct,[3] the CPPA also prohibits visual depictions of adults who "appear to be" minors engaging in sexually-explicit conduct, depictions of identifiable children whose images have been altered by a computer or "morphed" so that they appear to be engaging in sexual activity, and material that, while not containing sexually-explicit depictions of identifiable minors, "conveys the impression" that it might have such depictions. This case considers only the "appears to be" and "conveys the impression" provisions, whereby the CPPA criminalizes material that does not contain actual children or images of identifiable children.

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3. "Sexually explicit conduct" is defined as actual or simulated: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. § 2256(2)(A)-(E).

B. The Legislative Findings Do Not Support The CPPA's Expanded Definition Of "Child Pornography."

In its petition, the Government claims that the CPPA's expanded definition of child pornography was supported by thirteen legislative findings. (Pet. 3). The Government suggests that these findings show that new photographic and computer technologies permit the production of "virtual" child pornography wherein no actual children are used or depicted. The Government implies that these "virtual" materials, in turn, are being used to seduce children into sexual activity, whet the sexual appetites of pedophiles, prevent law enforcement from obtaining convictions in child pornography cases, and sustain the market for actual child pornography. (Pet. 3-5). But a closer look at the legislative findings proves the Government's implications to be untrue. (App. 67a-70a).

While the legislative findings show that child pornography involving depictions of real children has been used to seduce other children, to whet the sexual appetites of pedophiles, and to contribute to the market for child pornography, *see* 18 U.S.C. § 2251 note Findings 3, 4, 13, there are absolutely no findings showing that computer-generated pornography, wherein no actual or identifiable children are depicted, is being used for such activities. In fact, as the court of appeals in this case recognized, there are no factual studies that establish a link between computer-generated child pornography and the sexual abuse of children. (App. 20a) (citing Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornograph 6: A First Amendment Assessment of S. 1237,* 14 J. Marshall J. Computer & Info. L. 483, 488, 490 (1996)). More critically, the legislative basis for the CPPA was grounded upon the

Final Report of the Attorney General's Commission on Pornography, a report that preexisted the advances in computer technology identified by Congress. *See id.* The legislative findings therefore do not support a complete ban on computer-generated images that do not depict real children.

In addition, there are no legislative findings demonstrating that the Government has been unable to secure convictions in child pornography cases under the pre-CPPA definition of child pornography. The Government claims that "Congress was concerned that advancing technology ***could*** render unenforceable the prohibitions against the distribution and possession of child pornography." (Pet. 5) (emphasis added). The legislative findings do not contain a single reference to computer-generated, "virtual" child pornography that has escaped successful prosecution.

In the end, the CPPA's expanded definition of child pornography is not supported by its thirteen legislative findings.

C. The CPPA Bans Respondents' Expression.

The CPPA's radical alteration and expansion of the term "child pornography" has had a profound and adverse impact on countless numbers of artists, illustrators, photographers, and other creators who participate in constitutionally-protected, expressive activity that could be deemed by some as depicting minors even though, in reality, no actual children are depicted. (App. 55a). Recognizing the real threat the CPPA presented to the expressive activity of these

individuals, Respondents, The Free Speech Coalition,[4] Bold Type, Inc.,[5] Jim Gingerich,[6] and Ron Raffaelli,[7] filed a complaint challenging the CPPA in the United States District Court for the Northern District of California on January 27, 1997.

In their complaint, Respondents asserted that the "appears to be" and "conveys the impression" provisions of the CPPA violated the First and Fifth Amendments to the Constitution. Respondents asserted that these provisions: (1) prohibit the expression of free speech in violation of the First Amendment; (2) contain overbroad and vague language in violation of the Due Process Clause of the Fifth Amendment; and (3) unduly chill constitutionally-protected speech in violation of the First Amendment. Respondents did not challenge 18 U.S.C. § 2256(8)(C), which prohibits

4. The Free Speech Coalition is a California trade association that assists film makers, producers, distributors, wholesalers, retailers and Internet providers located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship. The Free Speech Coalition represents more than six-hundred businesses and individuals involved in the production, distribution, sale and presentation of non-obscene, adult-oriented materials. (App. 3a).

5. Bold Type, Inc. publishes *California's Nude Beaches*, a book dedicated to the education and expression of the ideals and philosophy associated with nudism. (App. 3a).

6. Jim Gingerich is a well-known artist from New York City whose paintings include landscapes and large-scale nudes. (App. 3a).

7. Ron Raffaelli is a well-known, professional photographer who specializes in erotic photography and has published four erotic books including *Rapture*, published by Media Press in 1983. (App. 3a).

computerized "morphing" of identifiable children, an activity whereby images of real children are altered by a computer so that the children are depicted in sexually-explicit conduct. Respondents believe that, because these materials contain sexual depictions of identifiable children, or at least parts thereof, it is possible that such images could harm the children depicted, and hence, the First Amendment affords such images no protection. (App. 3a).

Respondents strongly oppose child pornography,[8] but they are nonetheless threatened and injured by the CPPA because they or their members produce, distribute, and/or possess materials, including film, photographs, paintings, and computerized images that could easily, although wrongly, be deemed to contain sexually-explicit depictions of minors. (App. 55a). None of Respondents' materials contain sexually-explicit depictions of actual minors, but the persons depicted in these materials may appear to some viewers as being under the age of eighteen or the advertising of the materials may be interpreted by some as conveying the impression that the material contains sexually-explicit depictions of minors.

As a result of the CPPA's broad prohibition of any material in which there "appears to be . . . a minor engaging in sexually explicit conduct" or that is advertised, promoted, presented, described, or distributed in such a way as to "convey the impression" that a minor is engaging in sexually-explicit activity, a number of persons have ceased the production, distribution and possession of certain forms of expression, which do not involve minors, in fear of being prosecuted under the Act. (App. 55a).

8. For example, The Free Speech Coalition has assisted in the eradication of such materials by offering and providing an award of up to ten thousand dollars in cash to any person providing information leading to the arrest and conviction of persons involved in child pornography.

REASONS FOR DENYING THE WRIT

This Court should deny the Government's request for a writ of certiorari for three reasons. First, the Government's arguments supporting the constitutionality of the "appears to be a minor" and "conveys the impression" provisions of the CPPA are without merit. Second, the court of appeals' ruling striking these two isolated provisions only invalidates a small portion of the CPPA and leaves law enforcement officials with sufficient means to achieve Congress' objectives in fighting the evils of child pornography. And third, there is no real conflict among the circuits on this issue.

A. The Court Of Appeals Rightly Concluded That The CPPA Constitutes An Unjustified Ban On Free Speech.

The court of appeals was absolutely correct in holding that the CPPA's "appears to be a minor" and "conveys the impression" provisions violate the First Amendment. Sexually-explicit, non-obscene materials depicting adults who appear to be minors or whose advertising conveys the impression that minors are depicted, when in fact they are not, are protected forms of expression under the First Amendment. By criminalizing these forms of expression because they might convey disfavored ideas to some of their recipients, the CPPA serves as a content-specific prohibition of speech, which can be upheld only if supported by a compelling governmental interest. The CPPA's content-specific prohibitions are not supported by such an interest because they exceed the Government's well-defined interest in regulating child pornography, which is limited to materials that visually depict sexual conduct by actual children.

Moreover, even if the Government's interest could be extended beyond preventing real children from being used to produce pornography, the "appears to be" and "conveys the impression" provisions of the CPPA are not narrowly tailored to support such an interest.

1. The CPPA Is A Content-Specific Ban On Protected Speech That Must Be Supported By A Compelling Governmental Interest.

This Court has consistently held that non-obscene material depicting adults engaged in sexually-explicit conduct, whether in the form of printed material, film, telephone communications, computerized images, or live performances, is protected by the First Amendment. *See Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (indecent images on the Internet). The fact that non-obscene speech may be offensive to some individuals does not justify its suppression. *See Carey v. Population Serv. Int'l*, 431 U.S. 678, 701 (1977). Indeed, "the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).

The CPPA's "appears to be" and "conveys the impression" provisions criminalize sexually-explicit materials that may communicate the impression of youthful images to their viewers. As such, these provisions are content-specific regulations of speech.[9] Laws prohibiting speech on

9. In its argument before the court of appeals, the Government conceded that the CPPA's "appears to be" and "conveys the impression" provisions are content-based regulations of speech. The Government makes no arguments to the contrary in its current petition.

the basis of its content presumptively violate the First Amendment and must be subjected to the most exacting of constitutional scrutiny. *See Boos v. Barry*, 485 U.S. 312, 321 (1988). This scrutiny requires the Government to demonstrate that the ban is supported by a compelling interest, and the ban must be narrowly tailored to serve that interest. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (invalidating federal "dial-a-porn" laws passed to protect children from harmful sexual material). The Government can demonstrate no such interest in this case.

2. The Government's Interest In Banning Child Pornography Is Limited To Sexually-Explicit Materials That Depict Actual Children.

For two decades, this Court has made it clear that the Government's interest in regulating child pornography, as compelling as it may be, is "limited to works that *visually* depict sexual conduct by children below a specified age." *New York v. Ferber*, 458 U.S. 747, 764 (1982) (footnotes omitted) (emphasis *sic*). In *Ferber*, this Court upheld a New York law prohibiting the distribution of materials depicting sexual acts by children under sixteen years of age. In so doing, the Court classified child pornography as speech unprotected by the First Amendment. *See id.* This ruling was based on documented findings that minors can suffer serious harm by participating as *performers* in sexually-explicit materials. *See id.* at 758-59. Specifically, the Court noted that: (1) "the use of children ***as subjects of pornographic materials*** is harmful to the physiological, emotional, and mental health of the child," (2) the distribution of sexual activity by juveniles makes a "permanent record of ***the child's participation [in the activity],***" and (3) the distribution network must be closed "if the

production of material ***which requires the sexual exploitation of children*** to be effectively controlled." *Id.* (emphasis added).

This Court has therefore made it clear that the Government can ban child pornography only to the extent that the proscribed material portrays sexually-explicit conduct by actual children. *See id.* at 764. The Court has stressed that the Government's interest in regulating child pornography is "limited to works that visually depict sexual conduct by children below a specific age." *Id.* at 763-64. In addition, this Court has specifically authorized the use of young-looking adults in non-obscene, sexually-explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment. *See id.*

The CPPA's definition of child pornography exceeds the limitations placed on child pornography laws by this Court in *Ferber* by allowing constitutionally-protected expression, which does not depict anyone under the age of eighteen, to be punished as criminal activity. The CPPA bans sexually-explicit depictions of adults who happen to "appear to be minors." 18 U.S.C. § 2256(8)(B) (Supp. IV 1998). And it outlaws visual depictions that are advertised, promoted, presented, described, or distributed in such a manner as to "convey the impression" that they contain sexually-explicit depictions of minors, even though the images or performers are not actually children. *See id.* § 2256(8)(D). Both of these provisions turn protected speech into criminal contraband.

Simply stated, because the CPPA's "appears to be" and "conveys the impression" provisions involve materials in which no actual children are depicted, Congress lacks any

compelling interest in banning these sexually-explicit, non-obscene materials. Congress' interest in defining "child pornography" is limited to regulating materials that contain visual depictions of *actual* children engaged in sexual conduct, and not visual depictions that may appear to some viewers to be actual children.

3. The Other Interests Asserted By The Government Are Not Compelling And The CPPA Is Not Narrowly Tailored To Meet Them.

The Government suggests that its interest in enacting the CPPA is not limited to protecting children involved in sexually-explicit material. (Pet. 16). The Government contends that it also has a compelling interest in preventing the use of images of virtual children to seduce other children or to whet the sexual appetites of pedophiles. While in the abstract these proffered governmental interests may seem compelling, the CPPA's legislative findings do not establish either that virtual child pornography is being used to harm actual children or that the Government's proffered interests are in any way advanced by an absolute ban on traditionally-protected forms of expression.

First, in order to support its claim that there is a compelling governmental interest to ban virtual child pornography, the Government suggests that there is an epidemic of computer-generated child pornography depicting virtual, not actual, children, thereby allowing sexual offenders to whet their sexual appetites and to seduce children. This is simply not the case. As the court of appeals correctly noted, factual studies linking computer-generated child pornography and the sexual abuse of children do not exist, and there is therefore no "demonstrated basis to link

computer-generated images with harm to real children." (App. 20a). In fact, the evidence presented to Congress and the findings made by Congress fail to identify even one incident where a pedophile used computer-generated child pornography involving no actual children to seduce other children or to whet the pedophile's own sexual appetite. Absent such evidence, the Government is hard-pressed to suggest that there is any interest, much less a compelling one, to protect children from harm associated with computer-generated images of persons who are not actual children.

Second, even if there were evidence to show a link between computer-generated images of "virtual" children and harm suffered by real children, the CPPA would still be unconstitutional because it is not narrowly tailored to confront this type of harm. The CPPA does not merely impose "time, place, and manner" restrictions on computer-generated or other visual materials depicting persons who "appear to be minors" or that are advertised in such a way to "convey the impression" that minors are depicted. In fact, the CPPA is not even limited to computerized images. Instead, the CPPA makes criminal and totally bans all sexually-explicit materials that contain images — computerized or otherwise — that "appear to be minors" or that are advertised in such a way to suggest minors are depicted. In so doing, the CPPA expands the definition of child pornography so as to eliminate two forms of protected speech without making any attempt to limit such expression consistent with *Ferber*. *See* 458 U.S. at 763. Indeed, the CPPA could not be more broadly drafted. In attempting to restrict the materials to which pedophiles have access, the

CPPA also bans countless other materials that law-abiding citizens have a constitutional right to view.[10]

In sum, the CPPA fails the rigors of strict scrutiny analysis because it is not narrowly tailored to support a compelling governmental interest. Accordingly, the court of appeals was correct in concluding, as a matter of law, that the CPPA's "appears to be" and "conveys the impression" provisions unconstitutionally ban protected speech, and the granting of a writ of certiorari is not warranted in this case.

B. The Court Of Appeals Correctly Determined That The CPPA Is Unconstitutionally Vague.

The Government's petition also should be denied because the court of appeals correctly determined that the challenged portions of the CPPA are void for vagueness. Under the void-for-vagueness doctrine, laws violate the Due Process Clause of the Fifth Amendment when they: (1) do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, thereby failing to provide fair warning to those who wish to act lawfully, or (2) impermissibly delegate fundamental questions of policy to law enforcement officials, thereby allowing for unbridled and discretionary enforcement

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10. The CPPA closely resembles many other unconstitutional attempts by Congress to ban constitutionally-protected material in the name of "saving the children." *See Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (striking down federal regulations on "indecent" material on the Internet); *Sable Communications*, 492 U.S. at 128 (rejecting a ban on "dial-a-porn" messages); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73 (1983) (invalidating a ban on mailing unsolicited advertisements for birth control); *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (rejecting a ban on all sales of books deemed harmful to children).

of the law. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Both infirmities exist in the instant case.

First, the CPPA fails to define basic terms and phrases necessary to give persons of ordinary intelligence a basic understanding of what is prohibited. The CPPA does not define its highly subjective, yet key, "appears to be" and "conveys the impression" provisions. *See* 18 U.S.C. § 2256(8)(B),(D). Consequently, persons are left wondering: "Appears to whom to be a minor?" "Conveys to whom the impression that a minor is depicted?" "How does a minor appear?" Without more specific terms, no one can be exactly sure what these phrases mean, particularly since age, as with beauty, is in the eye of the beholder. *See American Library Ass'n v. Reno*, 33 F.3d 78, 90 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 2610 (1995) (citations omitted) (recognizing the difficulty in distinguishing whether performers are fourteen or eighteen, seventeen or twenty-one).

Second, the failure to provide definitions of these key phrases gives law enforcement officials unbridled discretion in enforcing the CPPA. The CPPA's undefined phrases defer to law enforcement officials in determining whether an adult depicted in a sexually-explicit work "appears to be a minor" and whether a depiction is advertised, promoted, presented, described, or distributed in such a manner that "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually-explicit conduct. Given the fact that a United States Senator has defined "safe-sex" educational materials as obscene[11] and a federal court has

11. Senator Jesse Helms (R-N.C.) asserted that written educational materials promoting "safe sex" were "obscene." 133 Cong. Rec. S14,203 (daily ed. Oct. 14, 1987) (statement of Sen. Helms).

classified some visual depictions of fully clothed persons as "sexually explicit,"[12] one can only imagine the types of material that law enforcement officials will deem criminal under the amorphous phrases "appears to be a minor" and "conveys the impression of a minor."

Plainly, even assuming that the entire concept of prohibiting sexually-explicit visual depictions of non-children and youthful adults is constitutional under the First Amendment — a conclusion that the Respondents in this case strongly contest — the CPPA is nonetheless unconstitutionally vague, and the court of appeals was correct in so holding. Thus, the granting of a writ of certiorari is not warranted as to the issue of vagueness.

C. The Court of Appeals Correctly Determined That The CPPA Is Unconstitutionally Overbroad.

The Government's petition should also be denied because the court of appeals correctly concluded that the challenged portions of the CPPA are overbroad. Legislation regulating speech is unconstitutionally overbroad when it includes within its sweep not only activity that can legitimately be prohibited, but also activity that is constitutionally protected under the First Amendment. *See Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

The CPPA's plain language, which bans both visual depictions of adults and computer-generated non-persons who "appear to be" minors and promotional materials that

12. *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 897 (1995) (finding that the phrase "lascivious exhibition of the genitals or pubic area" does not require full or partial nudity, but can also apply to clothed persons as well).

"convey the impression" that there may be depictions of minors, is unconstitutionally overbroad because it impermissibly suppresses material that is protected by the First Amendment. *See Reno v. ACLU*, 521 U.S. at 874-75. The CPPA directly contravenes this Court's well-established precedent that, if the visual depiction of sexual activity by minors "[is] necessary for literary or artistic value, a person over the statutory age who perhaps looked younger [can] be utilized." *Ferber*, 458 U.S. at 763-64. Under the guise of protecting children, Congress has impermissibly cast its legislative net far beyond the permissible target of child pornography and into the waters of protected speech.

The Government attempts to save the CPPA from an overbreadth determination by claiming that the law only addresses computer-generated virtual images and does not reach drawings, cartoons, sculptures, and paintings. (Pet. 19). This claim is not supported by the plain language of the CPPA. The CPPA clearly states that it applies to "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means." 18 U.S.C. § 2256(8). Nothing in the CPPA limits its provisions to computer-generated images of virtual children, and the Government's interpretation does not make it so.

The Government also attempts to cure the CPPA's overbreadth problems by invoking the law's affirmative defense provision.[13] (Pet. 19). This defense, however, cannot

13. The CPPA's affirmative defense requires a person charged with producing or distributing alleged child pornography to demonstrate: (1) that the material was produced using an actual (Cont'd)

remedy the CPPA's constitutional defects because it excludes from its protection countless numbers of presumptively-protected materials and impermissibly shifts the burden of proof to persons charged with violating the CPPA. As such, it is inadequate to remedy the CPPA's overbreath.

The affirmative defense fails to rein in the broad scope of the CPPA for several reasons. First, the defense offers no protection whatsoever to consumers and distributors who are not involved in the production of sexually-explicit materials and who have no way of knowing whether persons depicted in the materials are minors or even real persons. Second, because the defense requires persons charged under the CPPA to show that their work "was produced using an actual person or persons engaging in sexually explicit conduct," 18 U.S.C. § 2252A(c)(1), it offers absolutely no protection to illustrators and artists who create sexually-explicit images exclusively from their imaginations, not from identifiable persons. Third, the affirmative defense contains the same vague language found in the CPPA's definition of child pornography because it requires a defendant to show that the material was not promoted "in such a manner as to convey the impression" that it contained an illegally-depicted minor. *See* 18 U.S.C. § 2252A(c)(3). And finally, the defense affords

(Cont'd)
person, (2) who was an adult, and (3) that the person charged did not advertise or promote the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor. 18 U.S.C. § 2252A(c). The defense requires persons charged with possessing alleged child pornography to prove that: (1) there were three or fewer images, and (2) either the images were destroyed or they were reported and provided to law enforcement officers. 18 U.S.C. § 2252A(d).

little protection to artists, illustrators, and other individuals who create constitutionally-protected art that some may wrongly interpret as depicting minors in sexual conduct. Because the affirmative defense allows these individuals to create no more than two images and requires them to destroy or forfeit the property, the artisans' rights to express themselves are completely undermined. *See* 18 U.S.C. § 2252A(d).

In addition, the affirmative defense impermissibly shifts the burden of proof to the criminally accused. Contrary to due process requirements,[14] the affirmative defense, coupled with the CPPA's presumption that persons who "appear to be" minors are in fact actually minors, shifts the burden of proof to defendants in child pornography cases by requiring them to prove that actual or fictional individuals depicted are not minors. 18 U.S.C. §§ 2256(8)(B) and (D). This is constitutionally infirm.

In light of these inadequacies, the court of appeals correctly concluded that the CPPA is unconstitutionally overbroad, and the granting of a writ of certiorari is not warranted as to this issue.

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14. Constitutional due process principles "protect[] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Accordingly, the prosecution must prove every element of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by creating a presumption. *Sandstrom v. Montana*, 442 U.S. 510, 525 (1979).

D. Without The "Appears To Be" And "Conveys The Impression" Provisions, The CPPA Remains A Comprehensive And Effective Statute For Addressing Congress' Concerns About Child Pornography.

Petitioners further claim that a writ of certiorari should be granted in this case because the court of appeals invalidated "key" provisions of the CPPA. (Pet. 12). This is inaccurate. The court of appeals found only two isolated portions of the CPPA — the "appears to be" and the "conveys the impression" provisions — to be constitutionally infirm. As a result, the court's ruling excised only two limited portions of the statute, leaving the remaining portions of the CPPA in full effect.[15] Without the two unconstitutional provisions, the CPPA remains a comprehensive and effective means for addressing Congress' objectives in fighting the evils of child pornography. As such, there is no compelling need for further appellate review.

In passing the CPPA, Congress sought to advance four primary objectives. First, Congress sought to prevent child pornography from being used to seduce children into sexual activity. *See* 18 U.S.C. § 2251, note Finding 3. Second,

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15. Congress fully realized that some of the CPPA's provisions might be stricken by the courts. As a result, Congress specifically provided that, if some aspect of the definition were to be found unconstitutional, the invalidation of one element of the definition would not necessarily render inoperable the entire statutory framework. *See* CPPA, Pub. L. No. 104- 208, § 8, 110 Stat. 3009, 3009-31 (1996) ("[i]f any provision of this Act, including any provision or section of the definition of the term child pornography, . . . is held to be unconstitutional, the remainder of this Act, including any other provision or section of the definition of the term child pornography, . . . shall not be affected thereby.")

Congress wanted to preclude pedophiles and sexual offenders from using child pornography to whet their own sexual appetites. *See id.*, Finding 4. Third, Congress sought to undermine the use of computerized "morphing" technology, which allows an image of an actual child to be scanned into a computer and altered to make it appear as though the child is engaging in sexually-explicit activity. *Id.*, Findings 7 and 8. And fourth, Congress wanted to regulate the market for child pornography by preventing computerized images of children from being exchanged for other sexually-explicit images of children. *See id.*, Finding 12. Each of these objectives is still achieved by the CPPA as construed by the court of appeals.

Even after the "appears to be" and "conveys the impression" provisions are severed from the rest of the legislation, the CPPA's definition of child pornography still includes computer or computer-generated images where: (1) the production of the image involves the use of a minor engaging in sexually-explicit conduct; (2) the image is of a minor engaging in sexually-explicit conduct; or (3) the image has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually-explicit conduct. 18 U.S.C. § 2256(8). This definition is more than adequate to achieve Congress' objectives.

Congress' concerns about pedophiles using child pornography to seduce children into sexual activity are still confronted by a constitutionally-corrected CPPA and other child pornography statutes. The sexual exploitation of children is still banned because persons are prohibited from using, enticing, or coercing a minor to engage in sexual conduct for the purpose of producing a visual depiction of the activity. *See* 18 U.S.C. § 2251. Persons are still forbidden

from mailing or transporting child pornography by any means, including the computer. *See* 18 U.S.C. § 2252A(a)(1). Persons are still prohibited from distributing any child pornography. *See* 18 U.S.C. § 2252A(a)(2). And persons are still prohibited from possessing child pornography. *See id.* § 2252A(a)(2). Thus, in addition to the various state laws against corrupting minors, there remain several provisions of the CPPA that sufficiently confront individuals who attempt to use child pornography to seduce children.

Congress' concerns about the use of child pornography to whet a person's sexual appetite are also addressed by a constitutionally-corrected CPPA and other related child pornography statutes. Possession of child pornography, for any reason, is outlawed under 18 U.S.C. § 2252A(a)(5), which prohibits the knowing possession of any material containing an image of child pornography. Consequently, the possession of child pornography to whet a person's sexual appetite, or to accomplish any other objective for that matter, is still prohibited under the CPPA.

Likewise, the so-called computer "morphing" feared by Congress is also prohibited by a constitutionally-corrected CPPA. The definition of child pornography still includes any computer or computer-generated image or picture created or adapted to make it appear that an identifiable minor is engaging in sexually-explicit conduct. 18 U.S.C. § 2256(8)(C). In addition, persons are still prohibited from reproducing child pornography for distribution by any means, including the computer. *See* 18 U.S.C. § 2252A(a)(3). As a result, computer "morphing" activity is still banned.

And finally, Congress' concerns about the exchange of computer-generated child pornography for other sexual

images of children are still addressed. Persons are still prohibited from knowingly mailing, transporting, or shipping child pornography in interstate commerce. *See* 18 U.S.C. § 2252A(a)(1). Moreover, persons are still prohibited from selling child pornography, including computer-generated images of identifiable children. *See id.* § 2252A(a)(4). Thus, even without the two constitutionally-deficient provisions, the CPPA is still an effective tool for limiting the market for child pornography.

In sum, the severance of the "appears to be" and "conveys the impression" language from the body of the CPPA still enables the bill to serve its underlying purpose. Thus, the court of appeals' severance of two isolated portions of the CPPA does not warrant this Court's review.

E. There Is No Actual Conflict Among The Federal Circuits As To The Constitutionality Of The CPPA Because The Decisions Of The First, Fourth, and Eleventh Circuits Are Not Binding Precedent.

Finally, the Government contends that this Court must accept jurisdiction in this case to resolve a conflict among the federal courts of appeals on the issue of the constitutionality of the CPPA. (Pet. 14). In support of its contention, the Government cites cases from the First, Fourth, and Eleventh Circuits, *United States v. Hilton*, 167 F.3d 61 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999); *United States v. Mento*, No. 99-4813, 2000 WL 1648878 (4th Cir. Nov. 3, 2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999), which upheld the constitutionality of the CPPA. (Pet. 13-14). While the holdings of these cases may indicate that there is an apparent conflict among the circuits as to the

constitutionality of the CPPA, a review of the procedural and factual posture of the cases indicates that no actual conflict exists.

Unlike the declaratory judgment action at issue in this case, each of the cases cited by the Government were criminal cases initiated by the Government. *See United States v. Mento*, 2000 WL 1648878; *United States v. Acheson*, 195 F.3d 645; *United States v. Hilton*, 167 F.3d 61. In *Mento*, the defendant was charged with possessing "more than one hundred images of naked, prepubescent children in sexually explicit situations." 2000 WL 1648878, at *1. Mento entered a guilty plea to the charges against him and never contested the fact that he "knowingly possessed images of ***actual*** minors." *Id.* at *1, *8 n.5 (emphasis added). In *Acheson*, the defendant was also charged with possessing child pornography. 195 F.3d at 648. Specifically, Acheson was charged with possessing "over 500 computer images of child pornography. . . ." *Id.* Like Mento, Acheson entered a guilty plea to the charges against him and made "no attempt to assert any of [the images at issue were] not real children engaged in sexually explicit situations." *Id.* at 648 n.1. Finally, in *Hilton*, the defendant was charged with possessing "three or more images of child pornography," 167 F.3d at 67, and was ultimately convicted of possessing at least seven such images.[16]

Given the fact that each of the defendants in the *Mento*, *Acheson*, *Hilton* cases were ultimately convicted of possessing images of *actual* children engaged in sexually-explicit situations, the defendants' convictions and, in the case

16. Respondents' counsel obtained information regarding Hilton's trial and conviction from Hilton's counsel.

of *Hilton*, the indictment could not be altered by a determination that the "appears to be" and "conveys the impression" provisions of the CPPA were unconstitutional. In fact, the Fourth Circuit Court of Appeals expressly acknowledged this fact when it stated that it "would uphold Mento's conviction even if [it] determined the statutory language in question to be unconstitutional. . . ." *Mento*, 2000 WL 1648878 at *8 n.5. As such, the courts' opinions as to the constitutionality of these provisions of the CPPA were not necessary to the outcome of those cases and are merely dicta. Dicta does not constitute binding precedent. *See Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988). Because the holdings of the First, Fourth, and Eleventh Circuits are not binding precedent, they cannot be relied upon to establish an actual conflict.

Accordingly, there is no actual conflict among the federal appellate courts which would warrant the granting of the certiorari in this case.

CONCLUSION

Petitioners have failed to raise any genuine issues of exceptional importance. Accordingly, certiorari should be denied.

Respectfully submitted,

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